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3 UNITED STATES DISTRICT COURT
4 EASTERN DISTRICT OF WASHINGTON
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6 UNITED STATES OF AMERICA,)
7)
8 vs. Plaintiff,) No. CR-12-045-3-JLQ
9) MEMORANDUM OPINION
10 LUIS ALBERTO MARTINEZ FRANCO,) RE: SENTENCING
11 aka Jose Luis Galicias-Camacho,)
12 Defendant.)

13 A sentencing hearing was held in this matter which spanned four hours over the
14 afternoon of January 10, 2013, and the morning of January 11, 2013. Defendant was
15 present, in custody, and represented by Federal Defender Andrea George and Assistant
16 Federal Defender Amy Rubin. The Government was represented by Assistant United
17 States Attorney Stephanie Lister. The court heard and resolved several sentencing issues
18 including: 1) whether an obstruction of justice enhancement was appropriate; 2) the
19 adequacy of Defendant's criminal history calculation; and 3) whether Defendant was
20 safety-valve eligible. The court, taking into consideration the factors under 18 U.S.C.
21 § 3553(a) then pronounced the Judgment of the court imposing a sentence of 151-
22 months, the low end of the calculated Sentencing Guideline range, which the court
23 considered, but was not bound by. This Memorandum will memorialize and supplement
24 the oral rulings of the court.

25 **I. Obstruction of Justice**

26 The first issue presented was whether Defendant's actions in providing a false
27 name to law enforcement and/or the court and his outburst during the first trial

1 concerning someone killing his uncle merited a 2-level enhancement for obstruction of
2 justice under USSG § 3C1.1. The court put counsel on notice that it was considering
3 such adjustment in its Order of November 28, 2012. (ECF No. 242). The Government
4 contended the enhancement applied in its Notice of Review of Presentence Report (ECF
5 No. 248) and Defendant opposed such adjustment in his Sentencing Memo (ECF No.
6 256).

7 In order for the provision of false information to law enforcement to support the
8 enhancement, the information must have “significantly obstructed or impeded the official
9 investigation.” Application Note 4(G) to § 3C1.1. Merely providing a false name to an
10 arresting officer will generally not support the adjustment. Application Note 5(A) to §
11 3C1.1. After hearing argument of counsel, the court determined that the Government did
12 not establish that the false information significantly obstructed or impeded the
13 investigation or prosecution. The court also considered whether the trial outburst in the
14 hearing of the jury concerning the alleged killing of Defendant’s uncle, made as the jury
15 was retiring to deliberate in the first trial, constituted unlawfully influencing the jury or
16 attempting to do so under Application Note 4(A). The court determined such conduct,
17 in and of itself, while inappropriate, did not rise to the level of obstruction of justice.

18 The court also determined whether the Defendant provided materially false
19 information to a judge or magistrate judge. Under Application Note 5(F) such conduct
20 is obstruction of justice. Defendant did not disclose his true and correct name until his
21 testimony during the first trial. The Government was unable to establish anywhere in
22 the transcript of court proceedings where the Defendant stated he was Jose Luis Galicias-
23 Camacho, the name he gave to law enforcement, the name he was charged under, and the
24 name he had apparently been using with regularity since 2002. He was not asked to
25 confirm his name at his Arraignment/Initial Appearance (ECF No. 257). The
26 Government contends he made false representations to the court by signing a financial
27 affidavit as Galicias-Camacho and signing a Notice of Rights form. (ECF No. 24 & 25).

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2 As Defendant concedes, any materially false statement to the court invokes the
3 enhancement for obstruction, regardless of the impact of the statement. (See Defendant’s
4 Sentencing Memo, ECF No. 256, p. 2). It is the submitting of the financial affidavit and
5 Notice of Rights form, both signed by Defendant under the Galicias-Camacho name,
6 which comes the closest to meriting the enhancement. In *United States v. Hernandez-*
7 *Ramirez*, 254 F.3d 841, 842 (9th Cir. 2001), the Ninth Circuit addressed for the first time
8 “whether submission of a false financial affidavit to a magistrate judge for the purpose
9 of obtaining appointed counsel is sufficiently related to the offense of conviction to
10 support the adjustment [for obstruction of justice under 3C1.1]”. The Ninth Circuit held
11 that it was. However, that case can be distinguished because the defendant therein made
12 false statements about his assets and debts. Here, the false statement concerned
13 Defendant’s true and correct name. However, some courts have held that submitting a
14 false financial affidavit under a false identity merits the obstruction of justice
15 enhancement. See *United States v. Mafanya*, 24 F.3d 412 (2nd Cir. 1994)(applying the
16 enhancement and finding defendant “lied to the magistrate judge by submitting a
17 financial affidavit under a false identity.”).

18 Based on defense counsels’ representations as to how and when those forms were
19 prepared in this case, the court found that they were not prepared/signed in open court.
20 Based on the Defendant asking to address the court on the first day of the first trial
21 before jury selection to correct his name, the court concluded that, while a close call,
22 Defendant’s conduct did not rise to the level of obstruction of justice.

23 **II. Criminal History**

24 The Government argued that a criminal history (“CH”) score of zero points and
25 CH level I seriously underestimates Defendant’s CH. The Government argued that the
26 court should adjust the CH level upward based on Defendant’s 35 administrative
27 removals, and based on that fact that on 3 occasions Defendant was apprehended while

1 driving a vehicle with 10 or more illegal aliens, which is suggestive of alien smuggling.
2 However, none of Defendant's prior arrests resulted in prosecution.

3 The presentence report ("PSR") notes these 35 prior arrests and 3 instances where
4 Defendant was driving a vehicle with 10 or more illegal aliens. (PSR ¶ 54). No timely
5 objection to this factual recitation in the PSR was made by the defense. The deadline
6 for objections to the PSR was originally December 3, 2012. (ECF No. 216). Defendant
7 moved to extend that deadline, and was granted until December 20, 2012. (ECF No.
8 242). Despite the extension, no timely objections were made. At the sentencing hearing,
9 Defendant contested whether there was sufficient evidence to establish that he was the
10 individual involved in the 35 arrests. Defendant challenged the fingerprint and
11 photographic evidence establishing that he was involved in the prior arrests. The
12 Government called Agent Lance Lyons as a witness, and he provided information on the
13 three A-files and the photographic and fingerprint identification. Fingerprints and
14 photographs were necessary to identify Defendant because he had used over 20 different
15 names and over 10 different dates of birth during his 35 arrests.

16 Defendant contended at sentencing that he had timely raised the issue by
17 mentioning it at page 7 of his Sentencing Memorandum which was filed on January 4,
18 2013, two weeks after the deadline for objections. The court finds Defendant did not
19 timely raise objection to the PSR's statements concerning prior arrests. However, the
20 court did hear the testimony of Agent Lyons on the issue and defense counsel was
21 allowed a lengthy cross-examination. After considering the testimony and the
22 photographic and fingerprint evidence, the court found by a preponderance of the
23 evidence that Defendant was the individual involved in the prior 35 arrests.

24 The court then considered whether Defendant's conduct was "prior similar adult
25 criminal conduct not resulting in a criminal conviction" for purposes of USSG §
26 4A1.3(a)(2)(E). The Government argued the conduct indicative of prior alien smuggling
27 was "similar" to the instant offense of drug smuggling. However, the court also

1 considered that a “prior arrest record itself shall not be considered for purposes of an
2 upward departure”.USSG §4A1.3(a)(3). Additionally, for whatever reason, Defendant
3 was not prosecuted based on any of these prior arrests. The court also found convincing
4 Defendant’s argument that the occasions which the Government considered indicative
5 of alien smuggling all occurred at least 12 years prior to the instant offense. Accordingly
6 the court found an inadequate basis for upward departure of CH, and thus the final
7 Guidelines calculation was offense level 34, CH - I, Guideline Range of 151 to 188
8 months.

9 **III. Safety Valve Relief**

10 The Defendant argued in his Sentencing Memorandum that he was eligible for
11 safety valve relief under 18 U.S.C. § 3553(f), which would allow the court to impose a
12 sentence below the mandatory minimum 10-year sentence. As the court stated at
13 sentencing, the Guidelines range is above the mandatory minimum, and even if
14 Defendant was eligible for safety valve relief, this court would not impose a sentence
15 below the mandatory minimum. However, the court concluded that Defendant was not
16 so eligible. Defendant bears the burden of proving his eligibility for safety valve by a
17 preponderance of the evidence. *United States v. Diaz-Cardenas*, 351 F.3d 404, 409 (9th
18 Cir. 2003); *United States v. Shrestha*, 86 F.3d 935, 940 (9th Cir. 1996).

19 Defendant must establish five criteria: 1) the Defendant does not have more than
20 one criminal history point; 2) the Defendant did not use violence or possess a firearm in
21 connection with the offense; 3) the offense did not result in death or serious bodily injury
22 to a person; 4) the Defendant was not an organizer, leader, manager, or supervisor of
23 others in the offense and was not engaged in a continuing criminal enterprise; and 5) the
24 Defendant has truthfully provided to the Government all information and evidence that
25 he has concerning the offense. *United States v. Ferryman*, 444 F.3d 1183, 1185-86 (9th
26 Cir. 2006); 18 U.S.C. § 3553(f).

1 Defendant meets the first and second criteria. Criteria three, four, and five are at
2 issue. In order for Defendant to be safety valve eligible, the offense must not “result in
3 death or serious bodily injury to any person.” § 3553(f)(3). Defendant was convicted
4 of possession with intent to distribute cocaine on both January 19, 2012, and April 30,
5 2012. The trial testimony was that on the January 2012 trip, Defendant was moving the
6 cocaine with another individual, Encarnacion, and that Encarnacion died as a result of
7 exposure to the elements in the cold and snow near the Canadian border. The court
8 concluded that the possession and transportation of the cocaine resulted in the death of
9 Encarnacion. Had Encarnacion and the Defendant not been attempting to smuggle the
10 cocaine across the border, he would not have been exposed to the elements. The case
11 of *United States v. Lerma*, 255 Fed.Appx. 440 (11th Cir. 2007) is somewhat similar. In
12 *Lerma*, defendant and eight others were smuggling cocaine on a boat. When the Coast
13 Guard approached, some of the crew members set fire to the boat. Defendant himself
14 suffered burns and argued that he saved another co-defendant by giving him a life jacket
15 and pushing him overboard. The defendant was found to not be safety valve eligible
16 because the offense had resulted in death or serious injury.

17 This court also found that Defendant was an “organizer, leader, manager, or
18 supervisor others” in regard to this offense. On the April 30, 2012 trip to retrieve the
19 cocaine, Defendant knew where it was and led the two co-defendants, Jose Luis Castro-
20 Mejia and Jose Daniel Gonzalez-Rodriguez to retrieve it. Those individuals were acting
21 as the Defendant’s mules. The court finds the Defendant acted as a supervisor and leader
22 on the April 30, 2012 trip.

23 The court also found that Defendant did not meet the fifth element—he did not
24 truthfully provide to the Government all information and evidence he had. The
25 Government argued he had not and did not recommend application of the safety valve.
26 Defendant primarily relied upon discussions he had with law enforcement in May 2012
27 in arguing that he had been truthful with the Government. In May 2012, Defendant was

1 not even truthful with the Government concerning his own identity. The Government
2 has argued this impeded their investigation. This court finds that Defendant has not
3 established by a preponderance of the evidence that he truthfully provided to the
4 Government all information and evidence he had concerning the offenses.

5 **IV. Conclusion**

6 The court determined the applicable Guidelines Range was 151 to 188 months.
7 The court determined Defendant was not safety valve eligible. The court then considered
8 the factors under § 3553(a) and imposed a sentence of 151 months.

9 **IT IS SO ORDERED.** The Clerk shall enter this Order and furnish copies to
10 counsel.

11 Dated this 16th day of January, 2013.

12 s/ Justin L. Quackenbush
13 JUSTIN L. QUACKENBUSH
14 SENIOR UNITED STATES DISTRICT JUDGE
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